

is claimant entitled to an award encompassing the whole body for the injury allegedly suffered to claimant's low back?

- (2) What is claimant's average weekly wage?
- (3) Is respondent entitled to a reimbursement or credit for an overpayment of temporary partial disability compensation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be modified. The Award, as amended by the Order Nunc Pro Tunc, sets out findings of fact in some detail and it is not necessary to repeat those herein.

Claimant contends she is entitled to a disability based upon a whole body impairment under K.S.A. 1999 Supp. 44-510e. Respondent, on the other hand, contends claimant is limited to a scheduled injury under K.S.A. 1999 Supp. 44-510d for the injury to her right leg.

Claimant's initial injury occurred on May 2, 2000, when, while helping transfer a patient from a bed to a chair, claimant's right leg twisted and snapped. Claimant testified that she felt a physical change in her leg on the outer part of the right knee. Claimant was able to walk, but was forced to limp. Claimant reported the injury to her supervisor within the next two days and was ultimately referred to Dr. Bruce Young on May 19, 2000. Dr. Young ordered an MRI and claimant was referred to Mark R. Rasmussen, M.D., an orthopedic surgeon.

Dr. Rasmussen first examined claimant on August 16, 2000, and ultimately recommended surgery, which was performed on August 24, 2000. The surgery included a partial excision of the discoid lateral meniscus and repair of a meniscal tear. Dr. Rasmussen assessed claimant a 9 percent impairment to the right lower extremity pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was referred to Edward J. Prostic, M.D., a board certified orthopedic surgeon, on March 13, 2001, for an examination at the request of claimant's attorney. At the time claimant appeared at Dr. Prostic's office, the intake sheet in Dr. Prostic's chart indicated claimant had difficulty with her right knee. During the examination, claimant advised Dr. Prostic that she was having ongoing difficulties with her low back as well. Dr. Prostic examined both the knee and the low back, attributing both conditions to the

May 2, 2000 injury. Dr. Prostic opined that an altered gait resulting from claimant's knee injury caused the low back and right hip complaints expressed by claimant.

Dr. Prostic assessed claimant a 5 percent impairment to the body as a whole for her lumbar spine condition and a 15 percent impairment to the right lower leg which, when combined pursuant to the *AMA Guides* (4th ed.), resulted in an 11 percent whole body functional impairment. Dr. Prostic testified that it would be significant if claimant completed multiple pain descriptions between May 2000 and November 2000 with no indication of any back pain. He felt that might possibly change his opinion regarding the cause of claimant's back complaints. He did not, however, go so far as to actually change his testimony. This question arose due to a series of daily pain description (DPD) sheets submitted by claimant during her treatment by Dr. Rasmussen. Over a period of several months, claimant filled out and signed numerous DPD forms, none of which indicated any back pain. The pain drawings showed claimant's pain symptoms were limited to her right knee. Nevertheless, Dr. Prostic did not change his opinion that the altered gait and body mechanics were the reason for the back and hip pain.

As a result of the dispute, on September 13, 2001, the Administrative Law Judge referred claimant for an independent medical examination to Vito J. Carabetta, M.D., board certified in physical medicine and rehabilitation. Prior to the examination taking place, however, claimant expressed a reluctance to be seen and examined by a male physician.

Claimant was then referred for an independent medical examination to Eden Wheeler, M.D., a physical medicine and rehabilitation specialist with Consultants in Neurology, P.C. Dr. Wheeler examined claimant on October 15, 2001. Dr. Wheeler diagnosed claimant (1) status post right lateral partial meniscectomy with modest lateral compartment narrowing and mild knee flexion/contracture with residual pain; (2) low back pain syndrome with the possibility of exacerbation of degenerative disc disease secondary to #1 with altered gait mechanics; (3) musculoskeletal right flank pain without right hip involvement; and (4) obesity contributing to #1 and #2. She assessed claimant a 13 percent whole person impairment pursuant to the *AMA Guides* (4th ed.) for both the knee and back conditions.

The dispute in this matter arises around whether claimant suffered injury to her knee and her low back, or whether her injury is limited to her right lower extremity.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹ Claimant was treated by Dr. Rasmussen for the injury to her knee, seeing Dr. Rasmussen on numerous occasions

¹ K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

over a nine-month period. The pain drawings created and signed by claimant displayed pain in her right knee only. However, both Dr. Prostic and Dr. Wheeler diagnosed claimant with low back pain resulting from claimant's altered gait due to her knee injury.

Claimant's workers' compensation award should include benefits for a permanent back impairment.

Both Dr. Prostic and Dr. Wheeler found a permanent impairment to the back and specifically related claimant's back injury to her altered gait. All three physicians, Dr. Rasmussen, Dr. Prostic and Dr. Wheeler, noted claimant's altered gait.

Claimant testified that walking with a limp caused a gradual worsening of her back symptoms. The fact that several months passed between claimant's knee injury and her first mentioning back pain is not surprising, given that the back condition developed over time.

Claimant proved that her knee injury caused an altered gait and that the altered gait caused a back injury. Accordingly, the back injury is compensable as a direct and natural consequence of claimant's work-related knee injury. The controversy surrounding claimant's conversation with Dr. Carabetta is a red herring. Claimant explained that Dr. Carabetta misunderstood that she was describing one particular event to illustrate certain knee symptoms she had been experiencing since her original injury. She was not describing a new symptom, nor was she describing a new accident or injury. Dr. Carabetta did not testify.

The Board finds a preponderance of the credible evidence supports a finding that claimant suffered an injury to her low back as a direct consequence of the injury to her right knee. Accordingly, claimant is entitled to permanent partial disability compensation based upon a 12 percent impairment to the body as a whole. This percentage is based on a compromise of the opinions of Dr. Prostic and Dr. Wheeler.

With regard to claimant's average weekly wage, the Board finds that claimant has proven an average weekly wage of \$362.56. This computation is made pursuant to K.S.A. 44-511(b)(4)(B) (Furse 1993), which, when computing an employee's money rate fixed by the hour, states as follows:

- (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, **unless the employer's**

regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (Emphasis added.)

Claimant testified several times during regular hearing regarding how she was paid and how many hours a week she worked. At least three separate times, claimant testified that she was paid for 7.5 hours a day, 37.5 hours a week, with anything over 37.5 hours being overtime. While claimant's attorney argues that claimant was less than certain about this, the Board finds claimant's testimony to be consistent enough to support the above average weekly wage. The Board affirms the Administrative Law Judge's determination of a \$362.56 average weekly wage. The Board further notes, with this average weekly wage, the stipulation of the parties submitted August 9, 2002, will control the fact that claimant was underpaid temporary partial disability in the total amount of \$206.82.

The Board, therefore, modifies the Award of the Administrative Law Judge dated July 30, 2002, as amended by the August 19, 2002 Order Nunc Pro Tunc, awarding claimant a 12 percent permanent partial disability to the whole body.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 30, 2002, as amended by the Order Nunc Pro Tunc dated August 19, 2002, should be, and is hereby, modified to award claimant a 12 percent permanent partial general disability to the whole body for the injuries suffered to claimant's right lower extremity and low back.

Claimant is entitled to a 11.44 weeks temporary total disability compensation at the stipulated rate of \$241.83 totaling \$2,766.54, followed by 49.8 weeks permanent partial general disability at the stipulated rate of \$241.83 totaling \$12,043.13, for a total award of \$14,809.67. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

In all other respects, the Award of the Administrative Law Judge of July 30, 2002, as amended by the Order Nunc Pro Tunc dated August 19, 2002, is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of April 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.²

In this instance, claimant was treated by orthopedic surgeon Mark R. Rasmussen, M.D., for a period of several months. During treatment, claimant was asked by Dr. Rasmussen's office to fill out certain pain drawings. These daily pain descriptions (DPD) completed by claimant failed to indicate any back involvement. The pain drawings consistently showed claimant's symptoms to be limited to her right knee only. In addition, when first referred to Edward J. Prostic, M.D., by her attorney, claimant filled out an intake sheet for Dr. Prostic's office, which also indicated right knee pain only, with no indication of any problem in claimant's back. It was not until claimant was examined by Dr. Prostic that any potential back involvement or pain was ever brought to light.

The Administrative Law Judge had the opportunity to observe claimant testify in this matter. When there is a conflict with the information provided to the various treating and examining physicians, the credibility of the claimant becomes a question of concern. The Board has found on many occasions in the past some deference should be given to an administrative law judge's conclusions when dealing with credibility questions because the

² K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

judge has the opportunity to assess that credibility while observing the live testimony of the witness. In this instance, this Board Member would find the Administrative Law Judge's determination that claimant did not suffer additional injury to her low back was a negative finding regarding claimant's credibility.

Finally, a dispute arose between claimant and the independent medical examiner Vito J. Carabetta, M.D. When claimant was referred to Dr. Carabetta, she expressed a reluctance to be seen and examined by a male physician. This objection did not arise until after claimant had been treated by Dr. Rasmussen, also a male physician, for several months without any noted objection. Additionally, claimant was referred by her attorney to Dr. Prostic, also a male physician, again with no objection from claimant. Why the sudden reluctance by claimant is unknown. However, there did arise an additional dispute between claimant and Dr. Carabetta. In his letter of September 13, 2001, to the Administrative Law Judge, Dr. Carabetta memorialized a discussion he had with claimant regarding a newly developed injury to her knee. Dr. Carabetta wrote that claimant was "essentially requiring of me that I view this as something that must be covered under the original injury that occurred quite some time ago on May 2, 2002." Apparently, Dr. Carabetta was unwilling to do this, which further added to claimant's reluctance to be examined by Dr. Carabetta. It was shortly after that incident that a determination was made that claimant would be examined by Eden Wheeler, M.D., a female physician.

This Board Member is concerned that the actions of claimant display an intent to enlarge her award by adding a back injury which was not verified or even identified by claimant's treating physician. This, coupled with the Administrative Law Judge's apparent reluctance to accept claimant's explanation, raises a question in this Board Member's mind regarding the credibility of claimant's complaints. This Board Member would find that claimant has proven an injury to her right lower extremity and would affirm the 9 percent permanent partial disability to claimant's right lower extremity at the level of the knee.

BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation